APPENDIX A

SMATHERS AND MERRIGAN
ATTORNEYS AND COUNSELLORS AT LAW
888 SEVENTEENTH STREET, N.W.
WASHINGTON, D.C. 20006

November 7, 1973

Honorable Dale W. Hardin
Commissioner
Interstate Commerce Commission
Washington, D. C. 20423

Re: Ex Parte No. 270, Investigation of Railroad Freight Rate Structure

Dear Commissioner Hardin:

Thank you for your very nice letter of October 23, 1973 and for the information furnished therewith.

Considering the serious problems confronting the Commission, the recycling industry throughout the United States and, of course, the railroads as a result of the continuing litigation in *Ex Parte No. 281—Increased Freight Rates, 1972 (S.C.R.A.P.* v. *United States,* et al), we find it exceedingly difficult to understand why your investigations announced to date do not include *non-ferrous metal scrap* and its competing virgin commodities as well as just iron ores and scrap iron and steel, and why they do not include wastepaper and competing wood pulp shipments instead of just lumber and lumber products.

While we understand the Commission's assertion that its investigative abilities are limited in terms of money and manpower, certainly these additional recyclable commodities (non-ferrous metal scrap and wastepaper) should fairly be added to and considered as part of *Ex Parte No. 270 (Sub-No. 5), Ex Parte No. 270 (Sub-No. 6),* and *Ex Parte No. 270 (Sub-No. 7),* especially in light of the long malingering litigation problem hereinabove referred to.

Accordingly, we urge you to take whatever actions are necessary—

(1) To add non-ferrous metal scrap to *Ex Parte No. 270 (Sub-No. 6)* and the competing virgin metal natural resource commodities to *Ex Parte No. 270 (Sub-No. 7)*, along with wood pulp, which is certainly one of our most important timber products, or in the alternative

(3) To commence at the earliest possible date additional *Ex Parte No. 270* investigations to cover the aforementioned recyclable commodities so heavily involved in the basic rate discrimination questions raised in *Ex Parte No. 281* and the related litigation.

Obviously, NASMI's committee is ready and anxious to meet with both you and Mr. Goodman. However, certainly the first step must be taken by the Commission, to wit, the commencement of active investigations regarding all of the important recyclable commodities—not just one of them. In fact, NASMI is principally concerned with all recyclable commodities other than scrap iron and steel—and those it represents (non-ferrous metal scrap, wastepaper, textiles, plastics) are the ones which create the biggest and most troublesome solid waste disposal problems for our federal, state and local governments. Accordingly, it is these which should clearly have some fair preference in the current freight rate investigation. Indeed, these are the recyclable commodities the Federal Maritime Commission selected for first order of investigation (see *Docket 72-35, FMC Investigation of Freight Rates Charged for Transportation of Wood Pulp and Wastepaper).*

Looking forward to your advice in this regard, I am,

Sincerely,

EDWARD L. MERRIGAN

ELM:gk
cc: Leonard S. Goodman, Esq.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C. 20423

November 13, 1973

Mr. Edward L. Merrigan
Counsel, National Association of
Secondary Material Industries, Inc.
Smathers and Merrigan
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

In the Coordinator's report, served October 10, 1973, *Investigation of Railroad Freight Rate Structure,* 345 I.C.C. 1, 2, after announcing that five subumbered investigations were being instituted, I stated that, "While shippers of various commodities may believe that the Coordinator should immediately institute investigations into the aspects of the railroad freight rate structure of critical concern to them, they must remember that the resources in terms of money and manpower of the railroads, the Special Projects Counsel, and the Commission are not unlimited." I therefore can understand your concern that investigations were not instituted with respect to non-ferrous metal scrap and wastepaper. Further, I appreciate your awareness that the Commission's "investigative abilities are limited in terms of money and manpower."

Although I am also well aware of the long "malingering" litigation problem surrounding the Commission's decision in Ex Parte No. 281, cited in your letter of November 7, 1973, I am unable to agree with your proposal to expand the ex parte subnumbered investigations, Sub-No. 5, Sub-No. 6, and Sub-No. 7. With respect to your alternate suggestion that a subnumbered investigation be instituted with respect to non-ferrous metal scrap, waste-paper,

and the virgin competitive products, obviously I am not in a position to advise you by letter when and if such an investigation will be instituted. You and all interested parties will be advised of developments in Ex Parte No. 270 by order, notice, or other appropriate means.

Rather than await an initiating response from the Commission, I renew my suggestion of October 23, 1973, that you meet with the Special Projects Counsel. I would suggest that you also meet with the railroad industry in order to determine whether or not it is possible to agree upon a relevant data base and limit areas of controversy. I can assure you that such efforts, if successful, will in the long run prove to be useful in the Commission's continuing study of the railroad rate structure.

For the convenience of all, I am arranging to have a copy of this letter and our previous correspondence included in the correspondence section of the basic Ex Parte No. 270 docket.

Sincerely,

/s/ DALE W. HARDIN
Dale W. Hardin
Commissioner

CC: Leonard S. Goodman

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.,
Appellees.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE INSTITUTE OF SCRAP IRON AND STEEL, INC.

JURISDICTION

Appellees dispute the grounds on which Appellants contend that the jurisdiction of this Court may be invoked.

Appellants base the jurisdiction of this Court on 28 U.S.C. § 1253.

Appellees, however, assert that this appeal is not from the grant or denial, opposed by the appellants, of an injunction, as required under Section 1253. In actuality, the lower court vacated an order of the ICC and remanded the matter to that body. This action was termed a "declaration" by both the lower court and the government. 371 F.Supp. at 1295 (Jurisdictional Statement in 73-1971 [hereinafter Gov. J.S.] at 13a); Brief of Appellants United States and Interstate Commerce Commission [hereinafter Gov. Br.] at 12. The party which did not prevail on such a declaration is not entitled to a direct appeal to this Court. *See Mitchell* v. *Donovan,* 398 U.S. 427 at 430-31 (1970).

STATUTES INVOLVED

Appellees herein incorporate by reference the statement of Statutes Involved set forth in the brief of Appellees Students Challenging Regulatory Agency Procedures (SCRAP), Environmental Defense Fund, *et al.,* at pp. 3-4. Additionally, 28 U.S.C. § 2201 and Section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1), are set out in the Appendix, *infra,* p. 1a.

QUESTIONS PRESENTED

Appellees herein incorporate by reference the statement of the Questions Presented set forth in the brief of Appellees Students Challenging Regulatory Agency Procedures (SCRAP), Environmental Defense Fund, *et al.,* at pp. 2-3. Additionally, the following question is presented:

Whether the court below clearly erred in finding on the evidence before it that an environmental impact statement on a proposed percentage increase in rail freight rates was inadequate where such impact statement failed to consider or explain the discriminatory treatment of ferrous scrap compared with other recyclables and iron ore.

STATEMENT OF THE CASE

Appellees herein incorporate by reference the Statement of the Case set forth in the brief of Appellees Students Challenging Regulatory Agency Procedures (SCRAP), Environmental Defense Fund, *et al.*, at pp. 4-15.

SUMMARY OF ARGUMENT

I. This Court has no jurisdiction over the instant appeals because the statute under which review is sought authorizes appeal only from the grant or denial of an injunction and Appellants appeal only from the grant of a declaratory judgment. The lower court's order did not coerce or restrain the action of any party—the primary characteristic of an injunction. Nor has the order been treated as an injunction by Appellants since no stay of the lower court's order was sought by Appellants.

II. The lower court had jurisdiction to review the Interstate Commerce Commission's (hereinafter ICC or Commission) orders of October 4, 1972 and May 7, 1973 for the purpose of considering compliance with NEPA. (National Environmental Policy Act, 42 U.S.C. §§ 4331 et seq.) No statutory prohibition of judicial review existed, given the posture of this case. In addition, the case was ripe for review under the standards previously enunciated by this Court. Since no administrative remedy existed for any Appellee hereunder, no question of exhaustion of administrative remedies is present. Accordingly, it was appropriate for the lower court to have reviewed the ICC orders.

III. The proper standard for reviewing the ICC's environmental impact statement is the rule of reason test adopted by virtually all circuit courts of appeal. The lower court's factual findings with respect to the

insufficiency of the environmental impact statement are to be tested in this Court by the "clearly erroneous" standard.

The lower court's opinion, *Students Challenging Regulatory Agency Procedures* v. *United States,* 371 F.Supp. 1291 (D.D.C. 1974) (Gov. J.S. at 1a), properly applied the rule of reason standard. The apparent bulk of the ICC's impact statement in the proceeding at issue is deceptive because the ICC failed to respond to the issues raised repeatedly by other federal agencies throughout the course of this proceeding. The comments and suggestions of the Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce and Interior and the General Services Administration were ignored. The ICC based its finding of lack of environmental implications on one unsubstantiated conclusion which was disputed by other federal agencies. In addition, the ICC refused to examine the underlying rate structure for possible discrimination against recyclable commodities, asserting that it had discretion when to make this examination. This assertion of discretion is in violation of the mandate of NEPA of compliance "to the fullest extent possible." Because the underlying rate structure has subsequently been studied by the ICC in Ex Parte No. 270, the ICC properly should have returned to the lower court to seek modification of the court's order if it believed that impact statement to be in compliance with NEPA rather than impose upon the time of this Court. Alternatives to the approved rate increases were suggested by numerous commentators and should have received reasoned consideration in the impact statement. These include: other allocations of the railroads' revenue needs; the inadequacy of an action under Section 13 of the Interstate Commerce Act for enabling shippers to challenge the discriminatory rate structure

imposed on recyclable commodities; and the disproportionate burden borne by ferrous scrap vis-a-vis other commodities, including iron ore. In addition, the Commission failed to explain in the impact statement why it had concluded that a "holddown" (limitation of rate increase) on all recyclable commodities but ferrous scrap would benefit the environment but a holdown on ferrous scrap would not likewise benefit the environment. Finally, given the circumstances of the Ex Parte No. 281 proceeding, it would have been appropriate for the ICC to have held a hearing on its draft environmental impact statement. Given all of these substantial deficiencies in the Commission's impact statement, the court was not "clearly wrong" in its findings of inadequacy under the rule of reason test.

Additionally, it was appropriate for the lower court to have placed reliance on the conclusions of five other federal agencies that the ICC had not complied with NEPA.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THE APPEALS

Appellants contend that this Court's jurisdiction of the appeals from the lower court's decision here at issue rests on 28 U.S.C. § 1253. This section provides for direct appeal to this Court:

> "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

It is settled that this provision allows a direct appeal only to a party which did not prevail on such grant or denial of injunctive relief and that the party which did prevail has no right to direct appeal on other issues.

Public Service Commission v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939).

These appeals are from the order of a three-judge district court which (a) denied an injunction sought by Appellees to restrain the collection of certain railroad freight rate increases, and (b) vacated ICC orders which found said freight rate increases "just and reasonable" and remanded the matter to the ICC. Appellants prevailed in the denial of injunctive relief by the three-judge district court and, therefore, have no right of direct appeal to this Court under 28 U.S.C. § 1253.

Appellants contend that any court action vacating an order of the ICC is an injunction which affords the United States, and any party opposing such court action, a right of direct appeal to this Court under 28 U.S.C. § 1253. Such contention is without merit. Previous cases in which direct appeal has been allowed have been ones in which:

(1) the vacating of the ICC order would have prohibited a regulated carrier from taking some action not allowed in the absence of an ICC order;[1]

(2) the vacating of the ICC order would have allowed a regulated carrier to take some action which the vacated order would have prohibited;[2] or

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[1] *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409 (1967) (appeal from order of three-judge district court enjoining issuance by ICC of certificate of convenience and necessity without which carrier could not operate); *Railway Express Agency, Inc.* v. *United States*, 82 S.Ct. 466 (Harlan, Associate Justice, 1962) (appeal from order of three-judge district court refusing to enjoin issuance of certificate of convenience and necessity without which carrier could not operate); *United States* v. *Idaho*, 298 U.S. 105 (1936) (appeal from order of three-judge court vacating ICC order authorizing abandonment of a rail line, without which authorization carrier could not abandon such line).

[2] *Chicago & Eastern Illinois R.R. Co.* v. *United States*, 375 U.S. 150 (1963) (appeal from order of a three-judge district court refusing

(3) the vacating of, or refusal to vacate, the ICC order did not directly require any action or inaction by a regulated carrier, but was coupled with additional court action prohibiting, or refusing to prohibit, a regulated carrier from taking some action under the order in question.[3]

In all of these instances, the vacating of the ICC order had a necessary, coercive impact on what some party could or could not do, *or* was accompanied by the court's granting, or refusing to grant, an order which would have coerced directly some action or inaction of a party. Such is not the situation in this appeal. Vacating the ICC findings that the rates in question are just and reasonable has had no coercive impact on the Appellants. No coercion of the ICC arose from the lower court's decision, as evidenced by the fact that the Commission has taken no further action in Ex Parte No. 281. The railroads may collect the freight rate increases which are the subject of the vacated orders and, indeed, have done so. The sole effect of vacating the orders is

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to set aside an ICC order disallowing certain rates); *United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774 (1945) (appeal from order of three-judge district court vacating certain provisions in a certificate of convenience and necessity which restricted the operation of a carrier); *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U.S. 461 (1929) (appeal from order of a three-judge district court setting aside in part an order requiring carrier to pay excess profits to ICC, *i.e.*, preventing carrier from retaining certain profits).

[3] *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) (appeal from order of three-judge district court enjoining collection of rates and vacating order of ICC finding such rates just and reasonable); *Luckenbach Steamship Co., Inc.* v *United States*, 364 U.S. 280 (1960) (memorandum per curiam) (appeal from denial of injunction sought to prohibit collection of certain rates which ICC refused to suspend pending investigation); *United States* v. *Idaho*, *supra*, note 1. (appeal from order of three-judge district court enjoining abandonment of rail line); *Alabama* v. *United States*, 279 U.S. 229 (1929) (appeal from order of a three-judge district court refusing to enjoin collection of rates found by ICC to be just and reasonable).

that the burden of proving the justness and reasonableness of the rates in any action for reparations remains on the railroads.[4]

The concept of coercion, either to act or to refrain from acting, is central to an injunction. "An injunctive order is an extraordinary writ, enforceable by the power of contempt." *Gunn* v. *University Comm. to End the War in Viet Nam,* 399 U.S. 383 at 399 (1970). The order of the three-judge district court which is the subject of this appeal is not an injunction. This conclusion is reinforced by the fact that Appellants have not sought a stay pending appeal, which the Appellants could reasonably have been expected to do if they genuinely believed that the district court order was an injunction enforceable by contempt proceedings, or, indeed, if that order was causing them any practical harm.

There is adequate reason for allowing an expedited direct appeal to this Court when the setting aside of an ICC order materially affects the ability of the transportation industry to operate, *e.g.,* when service is not provided because an order granting a certificate of convenience and necessity is set aside. Such judicial action could "paralyze totally the operation of an entire regulatory scheme." *Kennedy* v. *Mendoza-Martinez,* 327 U.S. 144 at 154 (1963). Here, however, there is neither the potential for, nor the fact of, such disruption.

In essence, the order of the district court is a declaratory judgment that the findings of fairness and reasonableness by the ICC are ineffective because the ICC's efforts to comply with certain requirements of law in making such findings were "substantially deficient." 371 F.Supp. at 1293 (Gov. J.S. at 6a). The Court, in the past, has held that declaratory judgments rendered

[4] Discussed in detail at p. 45, n. 48, *infra.*

by a three-judge district court may not be appealed directly to this Court under 28 U.S.C. § 1253. These holdings and the rationale for them are set forth in *Mitchell* v. *Donovan,* 398 U.S. 427 at 430-1 (1970) (footnotes omitted), as follows:

> "That leaves us with the question whether an order granting or denying only a declaratory judgment may be appealed to this Court under § 1253. In a recent case, Rockefeller v. Catholic Medical Center, 397 US 820, . . . , we gave a negative answer to that question, and we adhere to that decision. Section 1253 by its terms grants this Court jurisdiction only of appeals from orders granting or denying injunctions. While there are similarities between injunctions and declaratory judgments, there are also important differences. Kennedy v. Mendoza-Martinez, 372 US 144. . . . The provisions concerning three-judge courts, including the provisions for direct appeal to this Court, antedate the Declaratory Judgment Act of 1934, but Congress substantially amended the three-judge court provisions in 1937 and 1948 without providing for such direct appeals from orders granting or denying declaratory judgments.
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> "We have stressed that the three-judge-court legislation is not 'a measure of broad social policy to be construed with great liberality,' but is rather 'an enactment technical in the strict sense of the term and to be applied as such.' Phillips v. United States, 312 US 246. . . . Thus this Court's jurisdiction under that legislation is to be literally construed. It would hardly be faithful to such a construction to read the statutory term 'injunction' as meaning 'declaratory judgment.'
>
> "We conclude, therefore, that this Court lacks jurisdiction of the appeal."

Since the appeals herein are not from an order granting or denying an injunction in opposition to the position of Appellants, this Court lacks jurisdiction.

II. THE LOWER COURT HAD JURISDICTION TO REVIEW THE ICC ORDERS OF OCTOBER 4, 1972 AND MAY 7, 1973, AND IT WAS APPROPRIATE TO REVIEW THESE UPON ISSUANCE OF THE MAY 7, 1973 ORDER TERMINATING THE GENERAL REVENUE PROCEEDING.

The railroads contend that the lower court lacked jurisdiction to review the Commission's order served October 4, 1972, which approved the general rate increase on recyclable commodities, and the Commission's order served May 7, 1973, which permitted that increase to go into effect. Significantly, the Commission does not press this issue. The Commission is on record in a previous case in this Court that judicial jurisdiction of some aspects of its general revenue orders does exist. Brief of the United States, the ICC, and the Secretary of Agriculture in *Atlantic City Electric Co.* v. *United States* and *Alabama Power Co.* v. *United States,* Nos. 70-78 and 70-106.

The statutory jurisdiction of the lower court in this case, however, is clear. If any issue exists, it is the appropriateness of review of these orders under the doctrines of ripeness and exhaustion of administrative remedies.[5] Based upon the various factors outlined by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), the instant case is ripe for review. Additionally, because no administrative remedy exists, no question of exhaustion is presented.

A. Statutory Jurisdiction to Review.

Jurisdiction of the lower court to consider the issues raised in the instant litigation is based upon 28 U.S.C. §§ 1136, 2201, 2321-5. The railroads cite no statutory authority limiting that broad grant of jurisdiction to the federal district courts. As this Court noted, "judicial review of a final agency action by an aggrieved

[5] *See* 371 F.Supp. at 1296 (Gov. J.S. at 14a).

person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 140.[6]

The present posture of the case is clearly distinguishable from the situation considered by this Court in its October 1973 term in *United States* v. *Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669 (1973), where this Court concluded that no jurisdiction existed for a lower court to issue an injunction with respect to an interim surcharge pending investigation of the proposed rate increase.[7] In that decision, the Court concluded that the language and history of Section 15(7) of the Interstate Commerce Act [49 U.S.C. § 15(7)] indicated clearly that:

> "Congress had vested exclusive power in the Commission to suspend rates pending its final decision on their lawfulness, and had deliberately extinguished judicial power to grant such relief." 412 U.S. at 691.

No comparable deliberate Congressional purpose to cut off judicial review has been shown once the Section 15(7) proceeding has been completed and the ICC has issued its final order in the rate investigation proceeding.

In *Atlantic City* and *Alabama Power, supra,* the Government argued that:

> "All three of the federal government parties [including the ICC] on whose behalf this brief is filed are in agreement with the appellants in both cases that the courts below applied an erroneous prin-

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[6] As discussed at p. 13, *infra*, the ICC orders of October 4, 1972 and May 7, 1973 are "final" as that term is utilized by this Court in *Abbott Laboratories*.

[7] In its prior decision in this case, this Court specifically noted that it was not expressing a view on the jurisdiction of the lower court to review an ICC general revenue order for compliance with NEPA. 412 U.S. at 698, n.22.

ciple in dismissing the cases before them. Specifically, all three agree that the plaintiffs in *Alabama Power* are entitled to immediate judicial review of the issue presented there. . . . [W]e believe that the Commission's orders were not *per se* unreviewable. . . ." Brief for the United States, the Secretary of Agriculture and the Interstate Commerce Commission at pp. 16-17.

* * * *

"The Commission has made it clear that its revenue decision is administratively final, and would not be considered further in any potential future proceeding challenging particular rates. Accordingly, the presumption in favor of judicial review of adverse agency action applies. *E.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136. . . ." *Id.* at 19.

B. Appropriateness of Review.

In order to avoid judicial interference in the administrative process and to avoid imposing unnecessary burdens on the judicial machinery from premature requests for judicial review of administrative actions, the judiciary has developed additional requirements which a party challenging administrative action must satisfy before a court will be permitted to consider that challenge—ripeness for judicial determination and exhaustion of all appropriate administrative remedies. A review of the various factors weighed by the courts in determining whether a matter is ripe for determination shows that no basis for judicial deference existed in the instant case. Additionally, no administrative remedy existed which would permit *any* of the parties to challenge the adequacy of the ICC environmental impact statement in a subsequent administrative proceeding. Accordingly, the issue of exhaustion of administrative remedies is not present in this case. Therefore, it was appropriate for the lower court to review the Commission's orders of October 4, 1972 and May 7, 1973.

1. *The Case Was Ripe for Review.*

The administrative consideration of the environmental impact statement has been completed. The ICC stated specifically in its May 7, 1973 order that its Ex Parte No. 281 proceeding was discontinued (Gov. J.S. at 1e). The requisite finality of this proceeding, thus, existed. The Government notes in its brief that the agency decision with respect to environmental factors was final (Gov. Br. at 27).

In addition, the questions presented are "fit" for review at this time. No further administrative actions are contemplated in this proceeding. Judicial review, therefore, does not interfere with the administrative process. In addition, the ICC knows the basic issues raised by Appellees and others and has had sufficient opportunity to correct the record. An ample administrative record exists to afford review of the issues raised.

The approach suggested by the railroads of requiring environmental issues to be raised in potential Section 13(1) proceedings, even if possible, only raises the probability of a multiplicity of lawsuits. Rather than conserving judicial energy, this approach serves only to risk dissipating those energies.[8]

Finally, the public interest in this particular case was best served by prompt judicial review of the ICC action. The rate increases approved by the Commission in Ex Parte No. 281 already had been permitted to go into effect. Thus, no considerations of impairment of the present economic health of the railroads existed. Balanced against this lack of injury to either the rail roads or the ICC is the Congressional policy objec-

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[8] The Government likewise suggests that such an approach would dissipate the ICC's energy as well. (Joint Appendix in 73-1966 and 73-1971 [hereinafter A.] at 21.)

tive of requiring federal administrative agencies to consider the environmental implications of their actions. This Congressional objective can be enforced adequately only if administrative environmental impact statements are reviewed expeditiously. Failure to require compliance with NEPA raises the possibility of irreparable harm to the environment.

Based upon the standard enunciated by this Court in *Abbott Laboratories, supra,* 387 U.S. at 148-53, the instant case clearly is ripe for judicial review.

2. *No Administrative Remedy Exists.*

The railroads have suggested that this Court require the parties to seek consideration of the environmental issues in rate-by-rate administrative proceedings under Section 13(1) of the Interstate Commerce Act [49 U.S.C. § 13(1)]. But even if a shipper were to seek, *in a Section 13(1) proceeding,* to test ICC compliance with NEPA in a previous *general revenue proceeding,* that issue probably would not be relevant. A Section 13(1) proceeding would involve a challenge to a particular rate on a particular route. If that rate were just, reasonable, and nondiscriminatory, the Commission would have no power to alter it. Clearly, a shipper could not bring a Section 13 complaint against a particular carrier based solely on the failure of the ICC to comply with NEPA. No administrative remedy exists to test ICC compliance with NEPA in a general revenue proceeding which has been terminated, as this one has been. Thus, it was appropriate for the lower court to have considered the matters raised by parties challenging the Commission's orders of October 4, 1972 and May 7, 1973 as they relate to compliance with NEPA.

Despite the railroads' efforts to portray the law as settled that no aspect of a general revenue proceeding is appropriate for judicial review except on appeal

from a decision in a Section 13 proceeding, this is not an accurate statement of the law. As both this Court, and the lower court have noted, this question is not settled.[9] The Government clearly did not subscribe to the railroads' position in the *Atlantic City* and *Alabama Electric* cases. Quoting again from the Government brief in those cases:

> "The railroads argue that review is not now available because the shippers have allegedly not exhausted their administrative remedies by attacking the rates of interest to them in case-by-case proceedings under Sections 13 and 15(1) of the Interstate Commerce Act. *But there is nothing in the statutory scheme that evidences any Congressional intent that such further administrative proceedings precede judicial review of a final general revenue-need determination such as the Commission has made here, and the general doctrine of exhaustion of administrative remedies erects no barrier under the circumstances of this case.* That doctrine is simply another aspect of the finality requirement, and it does not apply here because the *Commission has fully considered and reconsidered the revenue questions;* there is *no premature interruption of the administrative process* and *no likelihood that the agency would itself give the general relief that the appellants seek. . . .*" (emphasis added). Brief of United States, Secretary of Agriculture, and ICC, *supra,* at 19-20.

This basic issue of judicial review pursuant to the Interstate Commerce Act in general revenue proceedings does not require resolution in the instant case. This Court need only determine that the judiciary does have jurisdiction to consider compliance by the ICC with NEPA in such a proceeding. But it should be recalled that the Commission's position in *Atlantic City*

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[9] *Atchison, Topeka & Sante Fe Ry. Co.* v. *Wichita Board of Trade, supra,* 412 U.S. at 814; 371 F. Supp. at 1296 (Gov. J.S. at 15a).

and *Alabama Power* was that general revenue proceedings are directly reviewable even without regard to NEPA. A fortiori, the present proceeding was reviewable to determine the NEPA issue.

III. THE COMMISSION'S ENVIRONMENTAL IMPACT STATEMENT IS TO BE TESTED BY A RULE OF REASON; THE LOWER COURT'S FINDING THAT THIS STANDARD HAS NOT BEEN MET IS NOT CLEARLY ERRONEOUS; AND THE LOWER COURT'S DETERMINATION THAT THE ICC DID NOT COMPLY WITH THE REQUIREMENTS OF NEPA IS CORRECT.

This Court should confirm the rule enunciated by the majority of circuit courts of appeal that judicial review of the content of an environmental impact statement is to be based upon a rule of reason test. When the content of the ICC's environmental impact statement in the instant case is examined pursuant to this test, the flaws are so substantial that this Court should not find to be clearly erroneous the lower court's determinations that the impact statement was inadequate. These flaws include: (1) the failure to respond in a reasoned manner to the adverse comments of five separate federal agencies; (2) the failure to undertake the necessary study of the underlying rate structure; (3) the failure to provide sufficient data of the impact of the rate increase on the environment; (4) the failure to explain the discrepancy in reasoning between allowing a hold-down on non-ferrous recyclable material but no hold-down on ferrous scrap; and (5) the failure to hold a hearing on the draft impact statement. The lower court's decision neither interferes with the administration of the Interstate Commerce Act nor imposes any barrier to railroad rate increases. It should be affirmed as a fair and reasonable accommodation of the obligations imposed on the Interstate Commerce Com-

mission by the Interstate Commerce Act and those imposed by NEPA.

A. The Proper Test for Review of an Environmental Impact Statement is the Rule of Reason.

With the exception of the railroads, all other parties appear to agree on the proper test for judicial review of an environmental impact statement required under Section 102(2)(C) of NEPA [42 U.S.C. § 4332(2)(C)].[10] The court must first examine whether the impact statement has been prepared in the proper form and with the appropriate consultations and publicity required by Section 102(2)(C)—namely, (1) preparation of a detailed impact statement covering the five items set forth in the statute;[11] (2) consultations with other Federal agencies having jurisdiction by law or possessing special expertise with respect to the environ-

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[10] The test proposed by the railroads—whether the agency gave detailed consideration to all of the factors mandated by NEPA—would apparently limit a court to an examination of whether the five factors outlined in Section 102(2)(C) have been discussed, without regard to the adequacy—or even the accuracy—of that discussion. The railroads label all further judicial consideration of the impact statement as substantive and subject to the stringent arbitrary and capricious test of 5 U.S.C. § 706(2)(A). The railroads attempt to equate review of the *content* of an environmental impact statement with review of the *underlying action* which is the subject of the impact statement.

[11] These five items are:

"(i) The environmental impact of the proposed action,
(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) Alternatives to the proposed action,
(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." [42 U.S.C. § 4332(C)(i)-(v).]

mental impact involved; (3) submission of the statement to the President, the Council on Environmental Quality, and the public; and (4) consideration of the statement in conjunction with the proposed action through the existing agency review processes.[12] Once this preliminary examination has been completed, the court then is to review the content of the impact statement utilizing a rule of reason test.[13] If the court is satisfied that this test has been met it may review the underlying decision to see whether that decision was arbitrary and capricious or an abuse of discretion in view of the information developed in the impact statement.[14]

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[12] Text of 42 U.S.C. § 4332(2)(C) following subparagraph (v).

[13] The Government waivers on its support for the rule of reason test, however, with respect to the question of whether the ICC was required to include a discussion of the underlying rate structure in the Ex Parte No. 281 impact statement, inexplicably suggesting an arbitrary and capricious standard for this question (Gov. Br. at 44).

[14] The Ninth Circuit recently determined, *en banc*, that review of an environmental impact statement, including review of the content of that statement, is governed by 5 U.S.C. § 706(2)(D), which provides:

> ". . . The reviewing court shall—(2) hold unlawful and set aside agency actions, findings and conclusions found to be—(D) without observance of procedure required by law."

The Court of Appeals concisely explained the policy considerations involved as follows:

> "We stand on § 706(2)(D) because NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C. § 4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply § 706(2)(D) in reviewing environmental impact statements for compliance with NEPA than if they confine themselves with the straight jacket of § 706(2)(A)." *Lathan* v. *Brinegar*, 7 ERC 1048 at 1058 (9th Cir. 1974).

The rule of reason test has been adopted by virtually all circuit courts of appeal.[15] This test was described by the Tenth Circuit in the following terms:

> "[T]he review of FES [Final Environmental Statement] is limited to the following:
> (1) Whether FES discusses all of the five procedural requirements of NEPA.
> (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
> (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas."
>
> *National Helium Corp.* v. *Morton*, 486 F.2d 995 at 1102-3 (10th Cir. 1973).

The Tenth Circuit, in *National Helium*, expressly followed Judge Wright's opinions in *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971) and *Scientists' Inst. for Public Information, Inc.* v. *AEC*, 481 F.2d 1079 (D.C. Cir. 1973). *See* 486 F.2d at 1001-2.

An essential requirement of the "rule of reason" is that "a reasonable discussion of the subject matter involved," *National Helium, supra,* must include enough information about the environmental consequences of proposed action, and about alternatives thereto, to al-

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[15] *Silva* v. *Lynn*, 482 F.2d 1282 at 1284-5 (1st Cir. 1973); *Conservation Council* v. *Frochlke*, 473 F.2d 664 at 665 (4th Cir. 1973); *Environmental Defense Fund* v. *Corps of Engineers* (Tombigbee Waterway), 492 F.2d 1123 at 1131 (5th Cir. 1974); *Louisiana* v. *FPC*, 503 F.2d 844 at 877 (5th Cir. 1974); *Natural Resources Defense Council, Inc.* v. *TVA*, 502 F.2d 852 at 853-54 (6th Cir. 1974); *Sierra Club* v. *Froehlke*, 486 F.2d 946 at 950 (7th Cir. 1973); *Environmental Defense Fund* v. *Corps of Engineers* (Gillham Dam), 470 F.2d 289 at 296 (8th Cir. 1972); *Lathan* v. *Brinegar, supra.* 7 ERC 1048 at 1058 (9th Cir. 1974); *National Helium Corp.* v. *Morton*, 486 F.2d 995 at 1001-3 (10th Cir. 1973); *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, 449 F.2d 1109 at 1115 (D.C.Cir 1971); *Scientists' Inst. for Public Information, Inc.* v. *AEC*, 481 F.2d 1079 at 1092 (D.C. Cir. 1973).

low informed decision-making. *See, e.g., Natural Resources Defense Council, Inc.* v. *Morton,* 458 F.2d 827 at 835 (D.C. Cir. 1972) (also expressly followed in *National Helium*); and *Silva* v. *Lynn,* 482 F.2d 1282 at 1284-5 (1st Cir. 1973). The agency must "explicate fully its course of inquiry, its analysis and its reasoning." *Ely* v. *Velde,* 451 F.2d 1130 at 1139 (4th Cir. 1971).

Finally, it should be emphasized that the lower court did not in any way attempt to substitute its judgment for that of the ICC on the underlying question of whether freight rates on recyclables should be allowed to go into force.[16] The "arbitrary and capricious" test for judicial review of a *substantive* agency action, which is the subject of an environmental impact statement, is simply not relevant in the instant case.[17]

As shown in the succeeding sections, the lower court correctly applied the rule of reason in the instant case.

B. The Lower Court's Factual Determinations Are Subject to Review in this Court by a "Clearly Erroneous" Standard.

Rule 52(a) of the Federal Rules of Civil Procedure requires that this Court affirm the three-judge panel's

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[16] The lower court specifically noted: "because we view the Commission's efforts to comply with NEPA's procedural commands to be sorely deficient, we do not reach the question whether the Commission clearly gave insufficient weight to this environmental value." 371 F.Supp. at 1299 (Gov. J.S. at 22a).

[17] The Government devotes three pages of its brief to a suggestion that the lower court had undertaken a *de novo* review of the evidence and that such review is improper. (Gov. Br., 37-39.) This would appear to be a misreading of the court's opinion. All that the court suggested was that if the ICC relied on Ex Parte No. 270 to satisfy its obligation to examine the underlying rate structure, it should adopt the position expressed by one Commissioner of delaying rate increases until that proceeding is completed. The Court *did not require the ICC to take this action,* nor did it hold that the impact statement was inadequate for a failure to impose a rate moratorium on recyclables. How such an observation becomes *de novo* review of the impact statement is unclear.

factual findings on the insufficiency of the Commission's environmental impact statement unless it finds them to be "clearly erroneous."[18] This Court, in the leading case on the issue, defined the "clearly erroneous" standard as follows:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite* and *firm* conviction that a mistake has been committed." (Emphasis added) *United States* v. *United States Gypsum Co.*, 333 U.S. 364 at 395 (1948).

The words "definite" and "firm" simply mean that a heavy presumption rests in favor of the lower court's factual findings. As one court phrased it, these findings come to the appellate level "well armed with the buckler and shield" of the "clearly erroneous" standard of Rule 52(a). *Horton* v. *United States Steel Corp.*, 286 F.2d 710 at 713 (5th Cir. 1961). Accordingly, it is not the role of an appellate court to second guess factual findings of a district court even if there may be real ambiguities in the evidence. As this Court put it:

> "It is not enough that we might give the facts another construction, or resolve the ambiguities differently. . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 at 495-6 (1950).[19]

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[18] The "clearly erroneous" standard has been previously applied in appellate review of a district court's findings on the sufficiency of an environmental impact statement. *See Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123 at 1137 (5th Cir. 1974).

[19] *See also, Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 at 123 (1969): "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court,

The deference which an appellate court is required to give the findings of the district court is not lessened where the district court's findings are based on documentary evidence. As the Supreme Court stated in *United States* v. *United States Gypsum Co.*, the "clearly erroneous" test is also applicable to "inferences drawn from documents or undisputed facts." 333 U.S. at 394. This rule has been repeatedly reaffirmed by this Court, and followed by federal appellate courts, since the *Gypsum* case.[20] It is based on important policy considerations. According to Professor Wright, "[e]ven in instances where an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's finding, for to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay." WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2587 at 748 (1971 ed.).[21]

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when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co. 333 US 364, 395."

[20] *E.g.*, *Zenith Radio Corp.* v. *Hazeltine, supra; United States* v. *Singer Manufacturing Co.*, 374 U.S. 174 at 195, n.9 (1963); *Commissioner* v. *Duberstein*, 363 U.S. 278 at 291 (1960); *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377 at 381 (1956); *Graver Tank Co.* v. *Linde Air Prod. Co.*, 339 U.S. 605 at 609-10 (1950). *See also, Engine Specialties, Inc.* v. *Bombardier Limited*, 454 F.2d 527 at 530 (1st Cir. 1972); *Custom Paper Prods. Co.* v. *Atlantic Paper Box Co.*, 469 F.2d 178 at 179 (1st Cir. 1972); *Bishop* v. *United States*, 223 F.2d 582 at 586-7 (D.C.Cir. 1955), *rev'd on other grounds*, 350 U.S. 961 (1956).

[21] *See also*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN.L.REV. 751, 764-71, 778-82 (1956); *Pendergrass* v. *New York Life Ins. Co.*, 181 F.2d 136 at 138 (8th Cir. 1950): "The

The "clearly erroneous" standard is especially necessary when the appellate court is asked, as in the instant case, to review a lower court opinion which is based on an assessment of various technical and expert opinions and complex and lengthy economic analyses. *See, e.g., Graver Tank Co.* v. *Linde Air Prod. Co., supra,* 339 U.S. at 611.

Thus, this Court ought not reverse the lower court's decision simply because Appellants urge that an alternative interpretation of the sufficiency of the environmental impact statement is possible. Even if such an alternative interpretation were equally reasonable—which is not the case here—this Court must still affirm the lower court's findings under the "clearly erroneous" test. *E.g., United States* v. *National Association of Real Estate Boards, supra,* 339 U.S. at 495-6. The lower court found here, *as a matter of sound economics,* that it is not possible to determine the economic (and thus the environmental) impact of the proposed rate increase on the basis of the evidence provided in the Commission's impact statement. There is nothing in the record here that would support a "definite" and "firm" conviction that this finding was wrong, so as to justify reversal under the "clearly erroneous" standard of Rule 52(a). *United States* v. *United States Gypsum Co., supra,* 333 U.S. at 395.

C. The Lower Court Properly Applied the Rule of Reason Test and Its Findings of Fact are Not Clearly Erroneous.

The lower court approached its task of reviewing the ICC's impact statement cognizant of the fact that

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entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

Congress had mandated compliance with NEPA by federal administrative agencies "to the fullest extent possible" [22] and that this provision has been interpreted uniformly by the courts as requiring maximum effort by these agencies, not as "an escape hatch" permitting minimal compliance.[23] Given (1) the lack of enthusiasm of the ICC in acknowledging and carrying out its obligations under NEPA,[24] (2) the failure of

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[22] 371 F.Supp. at 1298 (Gov. J.S. at 21a).

[23] Judge Wright in *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, *supra*, 449 F.2d at 1115, quoted from the conference report of the House and Senate approving NEPA to the effect that " 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. . . . [N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." Based on this language, Judge Wright concluded "the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority. [footnote omitted] Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." *Id.*

[24] With respect to the requirement under NEPA that a federal agency make a "good faith" effort to prepare a detailed environmental impact statement, it is relevant to recall the ICC's initial recalcitrance in resisting the strong recommendations by several federal agencies on the necessity of an environmental impact statement. The ICC's obvious lack of enthusiasm for such a statement at the outset could well have affected the manner in which is ultimately approached the writing of a statement at a later time. The ICC did not promulgate regulations outlining its procedures for compliance until March 28, 1972, more than two years after NEPA's enactment. (Gov. Br. at 6, 58-62.) The lower court observed with respect to ICC efforts in this case:

> "Though the Commission had told the Chief Justice, in connection with its application for a stay of our order against the temporary surcharge, as well as this court, that it was developing an impact statement, no statement was prepared for consideration at this hearing or even for consideration by the Commission before issuing its decision on the permanent increases." 371 F.Supp. at 1294 (Gov. J.S. at 9a).

When this order was suspended with respect to recyclable commodi-

the Commission to come to grips with the issues posed by other governmental agencies, and (3) the official position of these agencies that the ICC was not in compliance with NEPA, the lower court was correct in its conclusion that the ICC impact statement did not represent reasonable compliance with the mandate of NEPA. Fundamental flaws appear on the face of the final environmental impact statement itself. As discussed in the succeeding subsections of this brief, these flaws were repeatedly brought to the ICC's attention by EPA, CEQ and other federal agencies and by Appellees. The combined efforts of these parties, however, were insufficient to persuade the Commission to address the questions which NEPA requires the Commission to consider.

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ties, it was done only as the result of vigorous protests by EPA and CEQ, not out of any concern by the ICC for its NEPA obligations. (A. at 572-5, 566-72, respectively.) At the time of the lower court's decision, every environmental impact statement filed by the Commission had been filed as the result of judicial intervention in that proceeding.

Every other court which has reviewed ICC actions for compliance with NEPA has been critical of the Commission's efforts: (i) *Harlem Valley Trans. Assn.* v. *Stafford*, "The ICC has been slow in reacting to the directions of NEPA . . . ," 500 F.2d 328 at 331 (2d Cir. 1974); (ii) *City of New York* v. *United States*, "Such considerations do not justify the Commission's disregard of the law. . . . To permit an agency to ignore its duties under NEPA . . . would subvert the very purpose of the Act and encourage further administrative laxity in this area." 337 F.Supp. 150 (E.D.N.Y. 1972); and (iii) *Chemical Leaman Tank Lines, Inc.* v. *United States*, "We think that the Commission's approach seriously underestimates the nature of the analysis which [§ 102(a)(C) of NEPA], and the Act generally, contemplate." 368 F.Supp. 925 at 948 (D.Del. 1973).

Under a rule of reason test, it obviously is relevant if an agency's "track record" indicates that it will comply with NEPA only to the minimum degree necessary and then only when specifically forced to do so by the judiciary. *See Natural Resources Defense Council, Inc.* v. *Morton*, 7 ERC 1298 at 1302 (D.D.C. 1974).

1. *Failure to Respond to Comments.*

The environmental impact statement itself provides evidence of the refusal of the ICC to give thoughtful consideration to the comments received by the Commission on its draft impact statement. The Commission, in effect, conceded that its response to these comments was pro forma when it noted in the final environmental impact statement that "[t]he draft environmental impact statement was complete when issued . . . ." (A. at 16.) This view that the draft statement could be regarded as final and that the comments on the draft could be dismissed without serious response again is reflected in the Commission's reference to "post statement comments." (A. at 22.) The comment stage is meant to be a meaningful one in the environmental impact process. It is not merely a procedural obligation to be satisfied *after* the ICC has made up its mind. *Calvert Cliffs' Coord. Comm., Inc., supra,* at 1112-3, n.5. The brief recitation of the content of the various comments (A. at 22-24) and Appendix D to the final environmental impact statement (A. at 191-98) do not evidence the careful consideration of the issues raised by the commentators which is required. *Silva* v. *Lynn, supra,* 482 F.2d at 1285.

The comments of the CEQ and EPA were essentially ignored by the ICC. One example is the Commission's failure to consider the impact which the rate increase would have on long term investment decisions, even thought the ICC states in Appendix D that this issue was raised by both agencies (A. 197-98). Both EPA and CEQ had previously [in their October 30, 1972 letters to the ICC (A. 571 and 574-75)] urged that consideration be given to the effect which disparate freight rates might have on long-term investment in ore-intensive facilities versus investment in scrap-intensive facilities. The issue was not considered in the draft

environmental impact statement or met with a response in the final statement despite renewal of this suggestion in the comment period.[25]

A further question to which the ICC should have addressed itself is that of whether recycling of secondary commodities would have increased at an even greater rate but for rate disparities between primary and secondary commodities. Such a course of investigation was suggested by the Government Services Administration in its comments on the draft environmental impact statement (A. at 599). This suggestion from yet another governmental agency also was ignored by the ICC.

Another example of this failure to take the comments into consideration in the final environmental impact statement relates to the issue of whether secondary materials are subsidizing the shipment of other goods, including competing virgin materials. Numerous commentators quoted a 1969 Department of Transportation Burden Study[26] which showed that secondary materials, and particularly ferrous scrap, carry more than their proportionate share of the total rail shipment costs in comparison with other goods, including iron ore.[27] Although the detrimental environmental implications of a showing that secondary materials

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[25] Failure to consider the impact on long-term investment also is a violation of § 102(2)(C)(v).

[26] In September, 1971, the Department of Transportation (DOT) published a report entitled *Carload Waybill Statistics, 1969*, Statement TD-1. In January, 1973, DOT published a second report entitled, *An Estimation of Distribution of the Rail Revenue Contribution by Commodity Groups and Type of Rail Cars—1969*, known as the 1969 Burden Study. Excerpts from this Study were included in the record below in Plaintiff-Intervenor's Motion for Summary Judgment. Data from the 1969 Carload Waybill Statistics were a major input to the Burden Study.

[27] The Commission itself had recognized this fact at the time the lower court considered the ICC's Ex Parte No. 281 impact state-

bear more than their fair share of total freight costs are clear, the ICC made no attempt to analyze in detail these implications. The only ICC response with respect to the Burden Study contained in the impact statement is as follows:

> "It is because of these many and varied characteristics that bare reliance by a number of parties herein upon certain Burden Study statistics (which represent estimates only) to indicate the contribution a particular commodity may be making to the carriers' costs is not well taken. This matter will be amplified at a later point in this statement." (A. at 29.)

This amplification is not forthcoming and the ICC, thus, asks simply that reliance be placed in this bare conclusion. This conclusion is open to serious doubt since the ICC cites this same Burden Study for its own purposes and without qualification in the impact statement (A. at 46) and since the ICC has described this study elsewhere as "based on the most reliable information available" despite its shortcomings. 345 ICC 11 (1973).

The Government mistakes the meaning of the lower court's references to alteration of the impact statement (Gov. Br. at 36). The court, in noting the failure of the ICC to revise its impact statement to discuss the issues raised by these commentators, is not directing how the ICC is to respond to these issues; it is requiring that a reasonable response be forthcoming.

The failure of the ICC to consider the environmental implications of the underlying rate structure is discussed separately, *infra*, pp. 32-4.

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ment. In its order in Ex Parte No. 270, Commissioner Hardin noted: "while the 1969 burden study discloses that *iron and steel scrap is one of the top twenty positive revenue contributors* for movements within official territory, iron ores are similar [sic] disclosed for movements within official territory *to be one of the top twenty deficit contributors* to railroad net revenues. . . ." 38 Fed.Reg. 28600 (Emphasis added) (A. 717).

2. *Failure to Provide Adequate Data for Conclusions.*

In essence, the thesis advanced initially by the railroads and adopted by the ICC as the sole basis in the record for concluding lack of environmental effect of freight rates is that scrap rates fluctuate significantly over time and that total scrap shipments have increased despite past freight rate increases.[28] This conclusion is the sole basis cited for the ICC's conclusion that no significant environmental impact exists.

Numerous parties including EPA and CEQ have devoted extensive efforts to disproving this conclusion. As CEQ noted in its October 30, 1972 comments:

> "We also take exception with the Commission's conclusion that freight rates have no significant effect on the price of scrap and thus on the quantity consumed. The analysis presented purports to show that since the price of scrap fluctuates widely in the short run and since these fluctuations seem to have no direct relationship to changes in freight rates, rates therefore do not affect price. In actuality scrap prices are determined by a number of factors operating simultaneously, among them are the aggregate demand for steel, the price and transportation costs of iron ore, the supply of scrap, as well as the transportation cost of scrap and other factors. It would be surprising indeed, if, in light of the number of factors constantly at work in the scrap market, a close and simple relationship existed between scrap price movements and freight rate changes.
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> "Nor does data which shows a constantly growing consumption of scrap despite rate increases prove

[28] Even to make this point, it is necessary for the Government in its brief to go outside the record before the lower court (Gov. Br. at 28). Apart from this questionable presumption, the Government is forced to quote out-of-context statements not in the record (reference to Congressional testimony of Dr. Cutler [Gov. Br. at 29] where the point made was simply that higher costs, including disproportionately high freight costs, affect demand for scrap.

that freight rate decisions are inconsequential. Growth might have been materially higher or lower had a rate decisions [sic] been different. What is needed in each instance is a multivariate analysis to isolate the effect of transportation costs on scrap prices and the quantity consumed. It cannot be presumed from the evidence presented that freight rates are insignificant." (A. at 571-2.)

EPA made a similar observation in its letter to the Commission of the same date.[29] Appellee Institute of Scrap Iron and Steel, Inc. introduced a study commissioned by it which concluded that:

"(1) Present scrap markets are retarded because of transport rates which encourage the usage of iron ore.

(2) Future scrap markets are being affected because new investment that would be logically directed to scrap-intensive steelmaking is diverted because of the existing freight-rate structure to ore-intensive steelmaking.

(3) Iron ore (a limited domestic natural resource) is being exploited when it can and should be conserved.

(4) Some scrap iron that should be recycled is unable to move, thus the environment is despoiled by unnecessary accumulations of solid metallic waste." [30]

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[29] EPA commented: "[T]he historical data presented by the Commission does not support the conclusion that the movement of the commodities will not be affected and that there will be no adverse environmental impact. The fact that, for any commodity considered, the cost to a user is a prime consideration in his decision to use the secondary material as a raw material input, and that freight rates affect the cost to that user, is prima facie evidence that the rates would affect the use of the materials." (A. at 574.)

[30] Battelle Columbus Laboratories, *Summary Report on the Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap* 2 (Jan. 14, 1972) included as Attachment I to Plaintiff-Intervenor's Motion for Summary Judgment in the court below.

As the lower court noted, this study was merely dismissed by the ICC without any study of its own to refute these conclusions.[31]

The ICC suggests that it has based its impact statement on the bibliography included with the statement. Comparison of this bibliography with the impact statement shows clearly that the bibliography played little role in preparation of this statement. Only 15 works out of 527 listed in the bibliography are cited in the final environmental impact statement. The Department of Commerce expressed similar reservations about the adequacy of the utilization of this bibliography as well (A. at 578-9).

Based upon this record, the lower court did not err—still less did it "clearly" err—in concluding that the unsubstantiated assertions of the ICC did not support its conclusion that the rate increase would have no environmental impact. The lower court's suggestion that the Commission prepare a study of elasticity of demand for recyclable commodities (371 F.Supp. at 1306, Gov. J.S. at 39a-40a) was merely an attempt to require sufficient data so that the ICC, the President, the Congress, and the public can make an informed decision, on the basis of adequate evidence as to that question.[32] *See Natural Resources Defense Council, Inc.* v. *Morton, supra,* 458 F.2d at 837.

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[31] 371 F.Supp. at 1303 (Gov. J.S. at 33a-34a). The lower court quoted from a district court opinion, *Brooks* v. *Volpe* that:

> " 'The requirement that the statement be detailed places a heavy burden on government agencies to gather for and include in the impact statement enough information to show that compliance has been genuine, not perfunctory. * * * NEPA requires each agency to undertake the research needed to adequately expose environmental harms.' . . . 350 F.Supp. at 276, 279." 371 F.Supp. at 1303, n.34; (Gov. J.S. at 31a-32a).

[32] Moreover, this suggestion by the lower court merely reflected agreement by the Court with the recommendations given to the ICC by EPA and the Department of Commerce, 371 F.Supp. at 1302 (Gov. J.S. at 31a) (A. at 712 and 578).

3. *Failure to Examine the Underlying Rate Structure.*

The Commission freely acknowledges in its environmental impact statement that it did not examine the underlying rate structure in the Ex Parte No. 281 proceeding (A. at 24-6). The Commission does not argue that the underlying rate structure is irrelevant to the questions it must examine under NEPA in Ex Parte No. 281 (Gov. Br. at 40-3).

Its failure to examine the underlying rate structure is in clear violation of CEQ Guidelines, which provide:

> "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, *cumulative impact* of the action proposed. . . . Proposed actions, the environmental effect of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable." (Emphasis added) 40 C.F.R. § 1500.6(a).

Rather, the Commission argues that it may decide for itself the extent to which it will comply with NEPA in Ex Parte No. 281. No attempt is made to reconcile this purported discretion with the absolute command of NEPA that every agency shall comply with NEPA's requirements "to the fullest extent possible." [33]

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[33] As noted previously, this requirement has been interpreted uniformly as imposing a heavy burden on an agency to exert its greatest efforts to comply with NEPA. Judge Wright in *Calvert Cliffs'*, *supra*, 449 F.2d at 1114:

> "Of course, all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible.' We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not

The ICC argues that it should be accorded time to complete its Ex Parte No. 270 proceeding before considering, in its general revenue proceedings, *any* aspect of discrimination in the underlying rate structure, even where such consideration may clearly be possible.[34] Specific investigations have been instituted of the lawfulness of all rates subject to the Interstate Commerce Act maintained by railroads on scrap iron and steel (Ex Parte No. 270, Sub. No. 6) and iron ores (Ex Parte No. 270, Sub. No. 5). An environmental impact statement has been prepared in Ex Parte No. 270, Sub. Nos. 5 and 6, and submitted to the Council on Environmental Quality in final form.

Moreover, since the environmental impact statement in Ex Parte No. 270 (Sub. Nos. 5 and 6) is only a study, it is uncertain when, if ever, the Commission will take any action based thereon. Historical evidence is not encouraging on this question. The Commission's rate structure investigation in Docket 17,000 began in 1925 and was discontinued in 1933[35] and its class rate case

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intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."

See also, Hanly v. *Mitchell*, 460 F.2d 640 at 648 (2d Cir. 1972); and ANDERSON, NEPA IN THE COURTS 51 (1973) where it is suggested that the Second Circuit imposes an even more stringent obligation on Federal agencies—compliance even where the agency is reluctant or powerless to alter its proposed course of action—in order to preserve the integrity of NEPA.

[34] Ex Parte No. 270 is a comprehensive investigation of the railroad's freight rate structure with the objective of identifying and initiating any corrective action shown to be necessary. Environmental Impact Statement, Ex Parte No 270 (Sub. Nos. 5 and 6) at 1-1, lodged with the clerk of this Court as part of the record in this proceeding.

[35] The Investigation of Iron and Steel Articles, Docket 17,000 Part 6, was filed in 1925, and an order issued which prescribed rates under this subdocket on June 7, 1929, 155 ICC 517 (1929).

in Docket 28,300 began in 1945 and the tariffs based on this proceeding became effective in 1952.[36] Based on these factors and in light of NEPA's express command that all federal agencies comply "to the fullest extent possible," the lower court's determination that the ICC was unreasonable in refusing to consider any part of the underlying rate structure is not erroneous, much less "clearly" so.

Most significantly, the ICC now claims that it has in fact cured, via an impact statement in Ex Parte No. 270, this alleged shortcoming in its Ex Parte No. 281 proceeding with respect to ferrous scrap. The impact statement in Ex Parte No. 270 was served August 2, 1974. Rather than return to the lower court to seek a modification of its judgment, in light of this development, the ICC unnecessarily has burdened the Court with this controversy again. The Government suggests that the preliminary evidence available to it indicated that no discrimination existed in the underlying rate structure and that the lower court acted upon "unsupported suspicion" (Gov. Br. at 44). As noted in the preceding subsection, the lower court was not clearly erroneous in its determination that the information relied upon was not sufficient. In addition, the lower court was not relying on unsupported suspicions, but rather on the record made by other federal agencies before the Commission.

4. *Failure to Discuss All Reasonable Alternatives.*

Although not discussed by the lower court, the ICC's environmental impact statement does not meet the test for discussion of alternatives mandated by NEPA as enunciated by the District Court for the District of

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[36] Cass Rate Investigation 1939, commenced 266 ICC 447 (1945) and terminated 286 ICC 171 (1952).

Columbia in *Natural Resources Defense Council, Inc.* v. *Morton, supra,* 458 F.2d at 836-7:

> "Where the environmental aspects of alternatives are readily identifiable by the agency, it is reasonable to state them—for ready reference by those concerned with the consequences of the decision and its alternatives."

Much of the discussion in the section of the Commission's final environmental impact statement entitled "Alternatives" (A. at 140-57), although quite significant, does not relate to alternatives. For example, the first eight pages of this section deal with the ICC's obligations and jurisdiction under the Interstate Commerce Act and NEPA. A brief reference to whether freight rates should be structured to subsidize the shipment of recyclable commodities is so entwined with this jurisdictional discussion that the comment is virtually lost (A. at 145).[37]

Those commenting on the draft environmental impact statement raised the question of whether there were other means of allocating the railroad's revenue need than the manner selected. Rather than evaluate the implications of this alternative, the suggestion is simply rejected by the Commission without the necessary discussion (A. at 145-6).

The ICC notes that investigation and suspension proceedings provide one means of testing the appropriateness of particular rates (A. at 147-8) but does not analyze whether this type of proceeding could be utilized to investigate effectively the issues which it claims are inappropriate in general rate proceedings. An affi-

[37] The so-called "Alternatives" section also contains a restatement of the ICC's defense of its general rate decision (A. at 153). This constant movement from topic to topic contributes to the confusing nature of the environmental impact statement and is evidence of the ICC's lack of systematic approach to environmental problems required by Section 102(2)(A) of NEPA.

davit of Dr. Herschel Cutler included in the record below avers that no adequate remedy is available to ferrous scrap shippers. This is because the investigation and suspension proceeding, based upon an allegation of discrimination under Sections 3 and 13 of the Interstate Commerce Act, poses an intolerable burden on shippers.[38] The impracticality of such a vehicle should have been weighed by the ICC in its determination of alternatives to its proposed course of action.

As the Commission freely concedes in its general discussion of rate characteristics, not all commodities bear their full burden in supplying needed revenues (Gov. J.S. at 36d). An analysis of ways of equalizing this burden should have been included in the environmental impact statement, even if these methods of equalization might necessitate recommendations to Congress to limit prior transportation policy directives. It is incumbent upon the ICC to clarify its analysis as to the appropriate manner of reallocating any unfair burden now imposed upon recyclable commodities. This is not to suggest that the ICC must adopt such a reallocation, but that at a minimum, the ICC must make the attempt to define this alternative. Only if this is done can satisfaction of NEPA's Section 102 (2)(D) requirement that the ICC have before it and take into proper account all proper approaches to a particular project be insured. *Calvert Cliffs' Coord. Comm., supra,* 449 F.2d at 1114.

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[38] This affidavit was attached to Appellee Institute of Scrap Iron and Steel's Motion for Summary Judgment. Relevant excerpts from this affidavit are attached in the Appendix to this brief at 2a. It is significant to note that the Government characterizes general revenue proceedings as beneficial to "the Commission, the railroads, and the public" (Gov. Br. at 22). This reference, pointedly, does not include shippers.

5. *Failure to Discuss Why No Holddown Was Granted on Ferrous Scrap When a Holddown Was Granted on All Other Recyclable Commodities.*

Despite the Commission's efforts to minimize its role in general revenue proceedings, its role clearly is substantial. The ICC exerts its influence on rate increases proposed by the railroads by means of holddowns—authorization of rate increases of amounts or percentages less than these proposed. In Ex Parte No. 281, the ICC authorized holddowns in 29 separate exceptions.[39] While the general rate increase approved in this proceeding would approach a "theoretical" 4% (Gov. J.S. at 2d), the Commission itself notes that the effective rate of increase must reflect an 82% "effectiveness factor" (Gov. J.S. at 8d).

The Commission permitted the requested holddown on iron ore (341 ICC 298 at 392) and mandated a holddown on all recyclable commodities but ferrous scrap (Gov. J.S. at 86d). The holddown on other recyclables was justified in part on the ground that "This limitation will also have a beneficial effect upon the environment." (Gov. J.S. at 60d.) In addition, the Commission observes that "the holddown here imposed should encourage the movement and recycling of these commodities." (*Id.*)

The environmental impact statement fails totally to explain either the reasons for, or the impact of, discriminatory treatment of ferrous scrap vis-a-vis other recyclables on one hand and iron ore on the other. Nor does it explain how it can conclude that a holddown would encourage the recycling of all secondary commodities except ferrous scrap or that a similar holddown would not encourage iron and steel scrap

[39] The ICC list of holddowns is set forth in the Commission's order of October 4, 1972. (Gov. J.S. at 85d-86d.)

recycling. This discrepancy was pointed out to the Commission by numerous commentators,[40] but to no avail.

6. *Failure to Hold a Hearing on the Draft Impact Statement.*

One final factor considered by the lower court in its assessment was the reasonableness of the ICC's refusal to hold a hearing on the draft environmental impact statement. In proposed guidelines issued prior to the ICC's final environmental impact statement, the CEQ outlined its view as to when hearings are required:

> "In deciding whether a public hearing is appropriate, an agency should consider: (1) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (2) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (3) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; and (4) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives and/or written comments on the proposed action." 40 CFR § 1500.7(d).

The lower court considered the lack of a hearing as one further factor in evaluating the reasonableness of the ICC's compliance with NEPA. The court concluded that NEPA required that an environmental

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[40] CEQ letter of October 30, 1972 to the ICC (A. at 569); EPA letter of October 30, 1972 to the ICC (A. at 574); and Comments of the Institute of Scrap Iron and Steel on the draft impact statement (A. at 609).

impact statement be considered in the existing agency review process [41] and continued:

> "In this case, when the general rate increase was first being considered without an impact statement, oral hearings were held before the Commission. This fact at least *establishes a strong presumption for us that full consideration of the revised impact statement through 'existing agency review processes' must entail oral hearings before the Commission.*" (Emphasis added) 371 F.Supp. at 1307 (Gov. J.S. at 42a-43a).

The pressing need for such scrutiny at an oral hearing is emphasized by the ICC itself where, in its October 4, 1972 order, it singled out "testimony adduced at the oral hearings" as the particularly important element in its review of the entire record.[42]

The Court of Appeals for the Second Circuit, in *Greene County Planning Board* v. *FPC,* 455 F.2d 412 at 422 (2d Cir. 1972), held:

> "[S]ince the [environmental impact] statement may well go to waste unless it is subject to the full scrutiny of the hearing process, we also believe that the intervenors must be given the opportunity to cross-examine . . . witnesses in light of the statement."

That court recently chose to apply the principle enunciated in *Greene County* to the ICC in another proceeding in which the ICC had failed to hold a hearing on an environmental impact statement, saying:

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[41] Although the Commission asserts that hearings may not be required for all proceedings under Section 15(7) (*See* Gov. Br. at 50, n.20), all general revenue proceedings from 1958 through Ex Parte No. 281, have included oral proceedings allowing cross-examination and oral argument. *See* Ex Parte No. 212, 304 ICC 289 (1958); Ex Parte No. 223, 311 ICC 373 (1960); Ex Parte No. 256, 329 ICC 854 (1967), 332 ICC 280 (1968); and Ex Parte No. 259, 332 ICC 590 (1968), 332 ICC 714 (1969).

[42] Report of October 4, 1972, 341 ICC 290 at 332 (Gov. J.S. at 39d).

> "[T]he ICC ignores that we held in *Greene County I* that the literal language in NEPA requires that impact statements be prepared prior to hearings since the statement must 'accompany the proposal through the existing agency review process.'" *Harlem Valley Transportation Ass'n* v. *Stafford*, 500 F.2d 328 at 336 (2d Cir. 1974).

Similarly, the court below was correct in holding that the oral hearings in Ex Parte No. 281 were part of the existing agency review process at which the environmental impact statement should be subject to scrutiny.

D. Reliance by the Lower Court on the Conclusions of Other Federal Agencies with Respect to the Inadequacies of the ICC Environmental Impact Statement Was Appropriate.

The lower court's conclusion that the ICC environmental impact statement was inadequate rested in significant part on the opinions expressed by other federal agencies throughout the Ex Parte No. 281 proceeding with respect to the Commission's non-compliance with NEPA. Both EPA and CEQ are on record throughout the course of this proceeding recommending the steps necessary for ICC compliance and, subsequently, observing that the Commission had taken neither these steps nor any others which satisfied the requirements of NEPA. Acceptance by the lower court of the conclusions of other federal agencies—especially those with far greater expertise in compliance with NEPA than the ICC—certainly was reasonable.

On October 30, 1972, CEQ wrote to the ICC objecting to the Commission's October 4, 1972 order as follows:

> "[T]he Council feels that the basic environmental issues related to the existing freight rate structure and changes thereto, must be evaluated in a logical, analytical and timely fashion in compliance with the requirements of the National Environmental Policy Act. *The Commission's actions to date ap-*

pear to be inconsistent with the objectives of NEPA, and the *analyses undertaken to date by the Commission appear to offer an inadequate basis from which to draw conclusions concerning the impact of freight rates on recycling and environmental quality. . . .*" (Emphasis added) (A. at 570.)

EPA also protested to the ICC along similar lines.[43] Both agencies attached detailed critiques of the ICC position to these letters.[44]

Commenting on the draft environmental impact statement circulated March 5, 1973, the U.S. Department of Commerce observed:

> "We believe the conclusion cited in the summary sheet and on page 190 of the impact statement that the action taken in this proceeding will not have a significant adverse impact upon the quality of the human environment raises an important question about the purpose of the statement. The National Environmental Policy Act (NEPA) as quoted on page 11 (i.e., Section 102(2)(C)) requires that the statement set forth as fully and clearly as possible precisely what the environmental impact will likely be. *Simply giving the Commission's judgment on the issue without in-depth supporting documentation is insufficient.* We suggest, accordingly, that the final environmental impact statement give more attention to this issue and less to justifying

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[43] By letter of October 30, 1972, EPA observed that: "Although we are aware that the issues involved are extremely complex and require correspondingly extensive research and analysis, the impact statement process would seem to be an appropriate vehicle for such studies. On-going investigations by this Agency indicate that there is reason to believe that rate increases on secondary materials may curtail their movement with resultant adverse environmental impacts. *We therefore cannot support the Commission's proposed action on rate increases for secondary materials, scrap steel, and returnable containers.*" (Emphasis added) (A. at 572-3.)

[44] CEQ, Attachment A. 570-1; EPA, Critique A. 573-4.

a contemplated rate-making action." (Emphasis added) (A. at 576.)

The General Services Administration offered extensive comments on the draft statement, concluding:

> "*GSA believes the conclusions expressed* by the Commission in its Draft Environmental Impact Statement *are,* as hereinabove described, *inconsistent with its findings respecting the movements of individual solid waste materials.*" (Emphasis added) (A. at 606.)

The Department of Interior conclusions with respect to the draft impact statement also are critical of the ICC effort:

> "The revised draft is greatly expanded compared to that submitted last year; even so, the fundamental posture of the statement, in our judgment, remains unchanged. *The impact statement does not appear to us to meet the requirements of Section 102(2)(C) of the National Environmental Policy Act for providing a careful multi-disciplinary examination of environmental effect.*" (Emphasis added) (A. at 702.)

The two agencies most directly authorized by Congress to develop an expertise in environmental matters and to insure incorporation of environmental values in Federal agency actions renewed earlier criticisms. CEQ observed:

> "We feel, however, that there are several respects in which the present statement could be significantly improved by greater objectivity in the Commission's evaluation of the potential impact of its action on the environment.
>
> "Among the issues which we feel have not been adequately addressed, are the following:
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> 1. While we would certainly agree that the mere existence of rate differences does not imply rate discrimination, the Commission does not demonstrate that these differentials are justified by inherent cost differences or other factors.

2. In our letter of October 30, 1972, we pointed out the deficiencies of the Commission's approach to the question of the impact of rate changes on scrap consumption. The deficiencies have not been corrected. For example, the Draft Environmental Impact Statement ignores completely the very important consideration of how freight rates might affect long-run decisions on investment in scrap-intensive production facilities, such as electric arc furnaces.

3. The Commission has devoted little effort to analyzing alternative actions within its jurisdiction. We also find it difficult to believe, for example, that the economic well-being of the nation's railroads is really at stake here. Are there no other rate schemes that could provide the same revenues, without increasing or even maintaining rate differentials which might adversely affect environmental quality?" (A. at 705-6.)

Finally, EPA specifically classified the ICC's draft environmental impact statement as inadequate, concluding that:

> "The draft EIS does not adequately assess the environmental impact of the proposed freight rate increases on the movement of secondary materials, nor does it consider in reasonable detail the range of alternatives to the proposed action." (A. at 707.)

Rather than respond to these comments or attempt to meet the issues raised,[45] the ICC merely noted the existence of these objections and summarily rejected them without any reasoned analysis.

Acceptance by the lower court of these conclusions of every other Federal agency commenting on the

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[45] The changes made in the draft environmental impact statement before it was released in final are minimal, reflecting the Commission's view that the draft statement "was complete when issued." *See* discussion, *supra*, at p. 26.

ICC's efforts under NEPA clearly was reasonable and should not be overturned by this Court.

E. Unique Nature of Instant Case.

In reviewing the decision of the lower court, it is important to note several unique factors involved in this case. First, the confrontation in NEPA cases has usually been between environmental groups and occasionally economic interests on the one hand, and a Federal agency on the other. However, the normal skepticism which might be exhibited toward criticism of an agency impact statement because of the potential tendency to seize on every flaw and to emphasize its importance is not appropriate here. In the present proceeding, the most compelling and persistent criticism of the ICC's efforts to comply with NEPA come from *five other federal agencies*—the Environmental Protection Agency, the Council on Environmental Quality, the Departments of Interior and Commerce, and the General Services Administration. The lower court's similarly critical judgment reinforces the critiques of the federal agencies of the statement.[46]

Second, the remedy fashioned by the lower court has the relatively unique attribute of maintaining the status quo so as not to impair the legal rights of the economic interests involved in the litigation without in any way hindering the ICC in its administration of the Interstate Commerce Act or impairing the financial

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[46] The Ninth Circuit observed in *Lathan, supra*, 7 ERC at 1058: "As Mr. Justice Frankfurter said in a criminal case, in words that are equally applicable to the actions of administrative agencies: 'The history of liberty has largely been the history of observance of procedural safeguards.' *McNab v. United States*, 1943, 318 US. 332, 347. So it may also be with the history of environment. *See also, Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, D.C.Cir., 1971, 449 F.2d 1109, 1114-5; *Silva v. Lynn*, 1 Cir., 1973, [5 ERC 1654] 482 F.2d 1282."

health of the railroads.[47] The ICC has and can continue to permit general freight rate increases to be collected by the railroads.[48] The Government's assertion that the lower court's ruling would force the ICC "to abandon general revenue proceedings altogether" (Gov. Br. at 41) obviously is hyperbole and disproved by ICC actions subsequent to the court's decision.[49]

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[47] The prosecution by shippers of their rights is one method by which the interests of the environmental groups can be protected. To the extent that these shipping interests are better able to protect their interests, the cause of the environmentalists likewise is enhanced.

[48] It is not necessary for the ICC to approve the tariffs before they may go into effect. So long as the ICC has not suspended rates pursuant to Section 15(7) of the Interstate Commerce Act or disapproved those rates during any suspension period, railroads are permitted to impose these tariffs. As this Court noted in *Arrow Transp. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 at 659-60 (1963):

> "[t]he statute (footnote omitted) expressly provides that 'the proposed change of rate . . . shall go into effect,' if the Commission's proceeding has not been concluded and an order made within the period of suspension."

The ICC itself concedes in its Jurisdictional Statement that the only effect of the lower court's order is to prevent the "shift [of] the burden of proof concerning the reasonableness of individual rates that comply with the order from the carrier to the shipper." (Gov. J.S. at 13.)

This Court recognized the implications of this burden of proof shift last term in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade, supra*, 412 U.S. at 812-6, and, thus, approved the suspension of the ICC's order in that case by the lower court so "that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable." 412 U.S. at 818.

[49] Since the lower court's decision in the instant case, the ICC has permitted general rate increase of 3% with exceptions (Ex Parte No. 295); 2.8% (Ex Parte No. 299); 4% (Ex Parte No. 303); and 13.3% with exceptions (Ex Parte No. 305, embracing Ex Parte No. 301).

CONCLUSION

These appeals should be dismissed for want of jurisdiction under 28 U.S.C. § 1253. Alternatively, the judgment of the lower court should be affirmed.

Respectfully submitted,

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